

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

**In re: BAYCOL PRODUCTS LITIGATION**

**MDL No. 1431  
(MJD/JGL)**

**This Document Relates to:**

*Lowe, Nanette v. Bayer Corp., et al.*

Case No. 03-3150

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS DEFENDANT  
SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE  
FOR INSUFFICIENT SERVICE**

Defendant SmithKline Beecham Corporation d/b/a GlaxoSmithKline (“GSK”) respectfully moves the Court to dismiss GSK with prejudice from the above-captioned case because plaintiff failed to serve a summons and complaint upon GSK within the applicable limitations period.

**I. FACTUAL BACKGROUND**

This single-plaintiff case was originally filed on December 31, 2002, in the Circuit Court of Jefferson County, Mississippi, by a *pro se* plaintiff. According to the court dockets, plaintiff is now represented by the Rhodes Law Offices. According to the complaint, plaintiff resides in Mississippi.

Although plaintiff’s complaint names GSK as a defendant, plaintiff has never served GSK with summons and complaint. GSK is a Pennsylvania corporation with its principal place of business in Philadelphia, Pennsylvania. GSK was involved with the marketing of Baycol in the United States pursuant to a co-promotion agreement between GSK’s predecessor, SmithKline Beecham Corporation, and Bayer. GSK’s involvement with the marketing of Baycol ended on August 8, 2001, when Bayer Corporation voluntarily withdrew Baycol from the United States market.

## II. ARGUMENT

### A. **The Court Should Dismiss GSK From This Case Because Plaintiff Has Not Properly Served GSK.**

The Mississippi Rules of Civil Procedure require that a plaintiff serve a summons and complaint upon each named defendant within 120 days after filing a complaint or “the action shall be dismissed as to that defendant.” Miss. R. Civ. P. 4(h); *accord* Fed. R. Civ. P. 4(m).

Plaintiff in this case has never served GSK, even though more than three years have passed since the case was filed. *See* Affidavit of Marianne Gagliardi, attached as Exhibit A. Moreover, the court dockets reflect no attempt by plaintiff to serve GSK, as no return of service was ever filed. Because plaintiff failed to serve GSK within the mandated 120-day time period, GSK should be dismissed from this case.

### B. **The Court Should Dismiss GSK From This Case With Prejudice Because the Limitations Period Applicable to Plaintiff Has Expired.**

Because this case was filed in Mississippi, Mississippi substantive law applies. Mississippi’s borrowing statute provides that when a claim that has arisen in another state is time-barred in that state, it is also time-barred in Mississippi. *See* Miss. Code Ann. § 15-1-65. Here, plaintiff is a Mississippi resident. Since plaintiff’s claims arose in her state of residence (i.e., the state in which she was prescribed and ingested Baycol), Mississippi’s statute of limitations applies. Mississippi’s statute of limitations provides that personal injury actions must be filed within three years after a cause of action accrues. *See* Miss. Code Ann. § 15-1-49; *Cannon v. Mid-South X-Ray Co.* 738 So. 2d 274 (Miss. App. 1999) (holding that the residual three-year limitations period provided by Miss. Code Ann. § 15-1-49 governs product liability actions).

At the very latest, the three-year limitations period applicable to this plaintiff began to run on August 8, 2001, because the withdrawal of Baycol put plaintiff on notice that Baycol could have caused her alleged injuries, thus accruing plaintiff's cause of action. Therefore, the latest possible date on which this plaintiff could have filed an action against GSK was August 8, 2004. Since that deadline has passed, any attempt by plaintiff to re-file her complaint would be time-barred. Accordingly, when the Court dismisses GSK from this case for insufficient service, the dismissal should be with prejudice.

### III. CONCLUSION

For the reasons set forth above, GSK respectfully requests the Court to dismiss GSK with prejudice from this case because plaintiff failed to serve GSK within the 120-day time period, and because the applicable limitations period for filing an action against GSK has expired.

Respectfully submitted,

*Original Signature on File with Filing Attorney*

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Dated: September 15, 2006

### **CERTIFICATE OF SERVICE**

I, Shane T. Prince, hereby certify that on September 15, 2006, I caused to be served a true and correct copy of the foregoing Motion to Dismiss Defendant SmithKline Beecham Corporation d/b/a GlaxoSmithKline for Insufficient Service, electronically upon the following:

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